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Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.,
ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF AFFIRMANCE

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No. 84-312

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v.

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Inc., et al., Respondents.

On Writ of Certiorari to the United States Court
Of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE
OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION

INTEREST OF AMICUS 1/

The American Civil Liberties Union Foundation ("ACLU Foundation") is a national non-profit organization dedicated to the preservation of the rights and liberties embodied in the United States Constitution and, in particular, the Bill of Rights. Through legal counseling and litigation as well as public education, the ACLU Foundation seeks to protect the rights to free expression (particularly the freedom to dissent); equal treatment regardless of race, sex, religion, national origin, or physical handicap; fair play in encounters with government institutions; and privacy.

The ACLU Foundation provides legal assistance to individuals who, because of the prohibitive cost of constitutional

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1/ The parties' letters of consent have been lodged with the Clerk pursuant to Supreme Court Rule 36.2.

litigation, would otherwise be unable to press their claims. Through litigation, the ACLU Foundation provides a voice for minorities and those who espouse unpopular causes, who otherwise go unheard in the majoritarian branches of government. Like the respondent legal defense funds, the ACLU Foundation engages in no partisan political activities, but it does engage in advocacy through litigation.

The ACLU Foundation is a charitable entity organized, qualified, and recognized by the Internal Revenue Service under 26 U.S.C. § 501(c)(3) (1982). This year, the ACLU Foundation is a participating charity in the Combined Federal Campaign ("CFC" or "the Campaign"), pursuant to the regulations adopted by the Office of Personnel Management. 2/

2/ 5 C.F.R. Pt. 950, 49 Fed. Reg. 32,735 (1984).

The interest of the ACLU Foundation in this case thus is twofold. First, it is of vital concern that the First Amendment rights of the respondent legal defense funds be protected from petitioner's attempt to bar them from carrying their message to federal employees in the CFC. Second, because the CFC is the exclusive means of on-the-job charitable solicitation of federal employees, the ACLU Foundation has a strong interest in continued participation in the CFC in order to enhance its ability to defend the rights of the underrepresented.

SUMMARY OF ARGUMENT

The Combined Federal Campaign is the exclusive means of on-the-job charitable solicitation of federal employees. At issue in this case is whether respondent health and welfare charities, otherwise eligible to participate in the Campaign, may be excluded from carrying their message to federal

employees in the Campaign brochure solely because they use litigation to advance public policy goals.

Charitable solicitation through the CFC is expressive activity protected by the First Amendment because it serves the purposes of conveying information and seeking support for particular causes. See Secretary of State v. Joseph H. Munson Co., 104 S. Ct. 2839, 2849 (1984); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980).

Petitioner's attempt to bar respondents' participation in the CFC violates the First Amendment because it is not reasonably tailored to achieve significant government interests and does not leave open ample alternative channels of communication. This is the appropriate standard against which to weigh the government's conduct, even if the attempted ban on speech is content-neutral, because the

CFC is a limited public forum under this Court's cases.

"The existence of a right to access" to a government facility "and the standard by which limitations upon such a right must be evaluated differ depending on the character" of the facility. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983). The Court should look to the character of the Campaign, not of the federal workplace as petitioner contends, in its First Amendment analysis. Contrary to petitioner's assertions (Pet. Br. at 23 n.18), respondents do not seek unrestricted access to federal property to solicit funds from federal employees. Rather, respondents seek inclusion in the Campaign brochure, which is an unintrusive means of conveying their message. Thus, the Campaign itself, and specifically the brochure, is the proper forum for this Court's First Amendment analysis.

In Perry, the Court distinguished three types of forums: traditional public forums, limited public forums, and nonpublic forums. Limited public forums are those used for purposes of communicating thoughts and discussing public questions which have been limited to "use by certain groups * * * or for the discussion of certain subjects." Perry, 460 U.S. at 46 n.7 (citations omitted). Under this Court's forum cases, the CFC is a limited public forum created for expressive activity -- charitable solicitation -- by health and welfare charities because: 1) the CFC was designed for and dedicated to that expressive activity; and 2) the statements respondents seek to make in the Campaign brochure are fully compatible with the activity of the Campaign.

Petitioner contends that the Campaign was designed only for "traditional health and welfare charities," but the

"traditional" requirement is not to be found in the Executive Orders or regulations governing the CFC before promulgation of the Executive Order at issue. Moreover, access to the Campaign has not been so limited and selective that the CFC is a nonpublic forum. Compare Perry and Widmar v. Vincent, 454 U.S. 263 (1981). In contrast with the selective access cases, access to the CFC for expressive activity has been granted to a broad range of health and welfare charities and such access does not serve the proprietary mission of the federal workplace. Respondents here are within the category of charities for which the forum was created.

The exclusion of respondents from the CFC is not reasonably tailored to achieve significant government interests because none of the three justifications offered by petitioner supports the exclusions. The exclusion does not leave open ample

alternative channels of communication because the CFC is the exclusive means of on-the-job solicitation of federal employees.

ARGUMENT

Preliminary Statement

The issue in this case is whether charities that serve health and welfare purposes by means that include litigation can be excluded from a government-created forum for charitable solicitation solely because they litigate. At stake is not just a source of revenue for organizations such as respondent legal defense funds, but whether the government may selectively prohibit the exercise of protected speech in the Combined Federal Campaign because it disapproves of the use of litigation to advance public policy goals.

In this brief in support of respondents, the ACLU Foundation addresses principally the status of the CFC as a

limited public forum under this Court's case law. The underpinning of petitioner's forum argument is his portrayal of the CFC as "a context in which the First Amendment interests of groups that wish to participate are decidedly weak." (Pet. Br. at 28.) Such belittling of the First Amendment interests at stake is contrary to this Court's cases affording First Amendment protection to charitable solicitation of the kind involved here.

Petitioner's contention that the Campaign does not involve "a significant amount of expression" (Pet. Br. at 29 n.22) blinks reality. Under the regulations at issue, 3/ face-to-face solicitation by

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3/ The regulations governing the Campaign are codified at 5 C.F.R. Pt. 950 (1984). The regulations have since been amended at 48 Fed. Reg. 29,458 (1983) and 49 Fed. Reg. 32,735 (1984). Unless otherwise indicated in the text, the description of the CFC and

[Footnote continued]

eligible charities is not permitted. 5 C.F.R. § 950.507(a). 4/ The only opportunity for an eligible charity to inform employees through the Campaign materials of its eligibility to receive designated funds and its mission is the Campaign brochure, which "list[s] each voluntary agency approved by the appropriate Federal officials for participation in the CFC with a brief statement of about 30 words on its

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3/ [Footnote continued]

regulation citations refer to the Campaign prior to the 1983 and 1984 amendments to the regulations.

4/ Federal employees are provided a package of Campaign and publicity materials, including a pledge form and withholding authorization form. 5 C.F.R. § 950.521. The materials inform employees "of their right to make a choice" to designate an eligible charity as the recipient of their contributions. Id. at § 950.521(c). Employees are informed that the government encourages them to make a choice rather than to make undesignated contributions. Id.

programs." 5 C.F.R. § 950.521(e)(2). 5/ In the 30-word statements, eligible organizations present themselves and their goals, priorities, and accomplishments so that federal employees will have a sound basis for deciding which organizations to designate.

Like the other forms of charitable solicitation this Court has considered, the statements of charitable solicitation at issue here are "so intertwined with speech that they are entitled to the protections of the First Amendment." Secretary of State v.

5/ Of course, the brochure need not be read by employees on the job. It can be taken home or reviewed during nonworking time. Because charities participating in the Campaign convey their messages in writing, disruption is minimal. Any employee who is offended by the brochure "may escape exposure to [the] objectionable material simply by transferring [it] from envelope to wastebasket." Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 542 (1980) (footnote omitted). Accord, Bolger v. Youngs Drug Products Corp., 103 S. Ct. 2875, 2883 (1983).

Joseph H. Munson Co., 104 S. Ct. 2839, 2849 (1984). Accord, Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980). The brochure statements provide information to potential donors in a context which makes clear that the statements constitute a request for funds to support the litigation and other activities undertaken by the legal defense funds concerning issues of public importance. Despite petitioner's disparagement of the "expressiveness" of the brochure statements, he can provide no basis in the Court's precedents nor in logic for suggesting that face-to-face solicitation is

more deserving of First Amendment protection than the written statements at issue here. 6/

I. The Combined Federal Campaign Is A Limited Public Forum.

A. The Campaign Itself -- Not the Federal Workplace -- Is The Relevant Forum For Purposes Of First Amendment Analysis.

To decide whether petitioner's exclusion of respondents from the Campaign violates the First Amendment, the Court first determines the standard by which the government's restriction on speech is to be judged. The standard to determine the validity of a ban on First Amendment

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6/ It cannot be gainsaid that federal employees, too, have a First Amendment interest in the charitable solicitation involved in the CFC. Federal employees have the First Amendment right to contribute to the charities of their choice. National Black United Fund, Inc. v. Campbell, 494 F. Supp. 748, 755 (D.D.C. 1980) ("a donation to these charities [in the CFC] is an expression of and reflects the interests and preferences of the donor government employee"), rev'd on other grounds sub nom. National Black United Fund, Inc. v. Devine, 667 F.2d 173 (D.C. Cir. 1981).

protected speech depends in part on the character of the Campaign. We agree with petitioner that Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), in which the Court distinguished the standards applicable to different forums for expressive activity, is the proper starting point for analysis.

Petitioner, however, describes the "federal workplace," rather than the Campaign, as the forum "to which respondents ultimately seek access." (Pet. Br. at 23 n.18.) This completely misrepresents respondents' position in this case. Respondents have never sought "to allow the public unrestricted access to federal property to solicit funds from federal employees." (Pet. Br. at 25.) 7/

7/ Indeed, petitioner's argument that the CFC furnishes little opportunity for

[Footnote continued]

Respondents simply seek access to the brochure through which they can solicit designated funds, because the Campaign regulations close the federal workplace to charitable solicitation except through the Campaign. 5 C.F.R. § 950.507(a). This is not a case about charitable solicitation face-to-face in the hallways at the CIA or door-to-door at the Department of Justice.

The government created the CFC to provide a channel for charitable solicitation that is so unobtrusive and highly regulated by time, place, and manner restrictions that it can be conducted consistent with even the

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7/ [Footnote continued]

expressive activity (Pet. Br. at 17, 26-27) is inconsistent with his claim that respondents seek unrestricted access to federal property and granting them that access would create disruption at the federal workplace.

most sensitive government employment. 8/ Petitioner cannot have it both ways. Once the government limits charitable solicitation in the federal workplace to the CFC, the restrictions it places on speech within the Campaign must be weighed in the context of the forum it has created.

8/ As petitioner admits, the Campaign was created expressly for the purpose of regulating access to the federal workplace for charitable solicitation. (Pet. Br. at 4-5.) Prior to President Eisenhower's Executive Order No. 10,728 in 1957, which established the first procedures and standards for a uniform fundraising program, charitable solicitation was conducted on an ad hoc basis which included access to some federal facilities for on-the-job charitable solicitation. (Pet. Br. at 4-5.) President Kennedy's Executive Order No. 10,927 "directed that all ad hoc solicitations be ended, and that worthy charities be permitted to solicit in the Federal workplace through a single annual drive combining all participating agencies. Thus was born the Combined Federal Campaign." Statement of Donald J. Devine before the Subcomm. on Manpower and Housing of the House Comm. on Governmental Operations, 98th Cong., 1st Sess. (1983) (J.A. 309).

Every court which has considered a First Amendment forum issue in the context of the CFC has held or assumed that the CFC is the relevant forum. 9/ The district court in this case recognized that "'by providing organizations the opportunity to participate in the CFC, the government has, in effect, provided a billboard or channel of communication through which organizations can disseminate their appeals to federal workers.'" NAACP Legal Defense and Educational Fund, Inc. v. Devine, 567 F. Supp. 401, 406-07 (D.D.C. 1983), quoting NAACP Legal Defense and Educational Fund,

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9/ See NAACP Legal Defense and Educational Fund, Inc. v. Devine, 727 F.2d 1247, 1257 n.11 (D.C. Cir. 1984); NAACP Legal Defense and Educational Fund, Inc. v. Devine, 567 F. Supp. 401, 406 (D.D.C. 1983); NAACP Legal Defense and Educational Fund, Inc. v. Campbell, 504 F. Supp. 1365, 1367 (D.D.C. 1981); National Black United Fund, Inc. v. Campbell, 494 F. Supp. at 755. See also Black United Fund of New Jersey, Inc. v. Kean, 593 F. Supp. 1567, 1574 (D.N.J. 1984).

Inc. v. Campbell, 504 F. Supp. 1365, 1367 (D.D.C. 1981).

The repeated judicial acknowledgment of the CFC, not the federal workplace, as the relevant forum fully conforms to the approach taken by this Court in its First Amendment cases. 10/ For example, in Widmar v.

10/ The only citation offered by petitioner in support of the notion that the federal workplace as a whole is the relevant forum is U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 764 (D.C. Cir. 1983) (hereinafter "Namibia"), in which the court held that the FAA could not bar political advertising in display cases at Dulles International Airport and Washington National Airport. Because the display cases were facilities "'separated' from the terminals only by glass panels or translucent plexiglass whose sole purpose is to frame or project messages of outside organizations to the terminals' public users", the court refused to look at the display cases as totally separate from the public airport terminals in which they were located. Id. at 764. Namibia thus is consistent with this Court's teachings that a forum should not be viewed in isolation from its context. E.g., Widmar v. Vincent, 454 U.S. 298, 267 n.5 (1981); Lehman v. City of Shaker Heights, 418 U.S. 298, 303-04 (1974).

[Footnote continued]

Vincent, 454 U.S. 263 (1981), the Court held that a university which routinely provides university facilities for meetings of registered student organizations has created a forum generally open for use by student groups. The Court analyzed the First Amendment rights at issue in terms of student meeting facilities and observed: "We have not held * * * that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings." Id. at 267 n.5.

Similarly, in Perry, the Court defined the issue as whether the First Amendment requires that access to a "certain means of communication" within a public

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10/ [Footnote continued]

However, the court's holding in Namibia was limited to its "analysis of display advertising at these airports." 708 F.2d at 773.

school -- the interschool mail service and mailboxes -- must be granted to a rival union if it is open to the teachers' certified bargaining representative. 460 U.S. at 44. As the court of appeals recognized in this case, "the Supreme Court's analysis [in Perry] of school mail box facilities as a forum * * * -- as opposed to the school itself -- suggests that the CFC is the relevant forum." NAACP Legal Defense and Educational Fund, Inc. v. Devine, 727 F.2d 1247, 1257 n.11 (D.C. Cir. 1984). 11/

11/ In dissent from the court of appeals' decision, Judge Starr cited Lehman and Greer v. Spock, 424 U.S. 828 (1976), for the proposition that a forum cannot be viewed in isolation from its context. NAACP Legal Defense and Educational Fund, Inc., 727 F.2d at 1271 (Starr, J., dissenting). The principle is correct, but the focus of analysis only shifts to the larger context, as in Greer, when the expression is so intrusive as to dominate or interrupt the normal functioning of the property. Here, by contrast, the CFC was created expressly to prevent such interruption in the operation of the workplace.

The CFC is conducted at places of government employment. But because the CFC, by design, protects the federal workplace from intrusion for charitable solicitation, the CFC itself, and not the workplace, is the forum at issue.

B. The Campaign Is A Limited Public Forum Designed For And Dedicated To Expressive Activity By Speakers Such As Respondents.

In Perry, the Court distinguished three types of forums for expressive activity: traditional public forums, limited public forums, and nonpublic forums. The standard which is used to determine the validity of a ban on First Amendment protected speech is determined in part by the type of forum the government has created.

The first type of forum, the traditional public forum, is comprised of those means of communication or places which "by long tradition or government fiat have been devoted to assembly and debate." 460

U.S. at 45. Accord, United States v. Grace, 103 S. Ct. 1702, 1707 (1983). In this category are streets, sidewalks, and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Id. (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)). 12/

Second, "[a] public forum may be created for a limited purpose such as use by certain groups, e.g., Widmar v. Vincent, (student groups) or for the discussion of certain subjects, e.g., City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n [429 U.S. 167

12/ Accord United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 133 (1981) ("Congress * * * may not by its own ipse dixit destroy the 'public forum' status of streets and parks which have historically been public forums").

(1976)] (school board business)." Perry, 460 U.S. at 46 n.7. Although the government is not required to retain indefinitely the open character of a limited public forum, "as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." Id. at 46.

Finally, a nonpublic forum is not by tradition or designation a forum for public communication. Id. at 46.

Under this Court's forum cases, the CFC is a limited public forum expressly created for expressive activity by certain groups: those that provide health and welfare services to those in need.

In order to determine whether the government has created a public forum, limited or otherwise, this Court has examined

the nature of the forum in light of two factors. First, the Court has determined whether the forum has been "designed for and dedicated to expressive activities." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975). 13/ The CFC was designed and designated for charitable solicitation by health and welfare charities. Second, the Court has determined whether expressive activity within the forum "is basically incompatible with the normal

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13/ Accord, Widmar, 454 U.S. 263 (through policy of accommodating student group meetings held in university facilities, university created forum generally open to use by student groups); Heffron, 452 U.S. 640 (Minnesota State Fair was limited public forum in that it was designed to provide means for great number of exhibitors to present their views to large audience); City of Madison Joint School Dist., 429 U.S. 167 (school board business meetings opened by state for direct citizen involvement constituted public forum). Cf., Haque, 307 U.S. 496 (resting availability of a given locale for expressive activity upon its historical role as an arena for public expression).

activity of [that] particular place at [that] particular time." Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). The expressive activity at issue is expressly permitted in the regulations governing the Campaign. Thus, the CFC is within the public forum category as a limited public forum for expressive activity by health and welfare charities.

1. The Combined Federal Campaign Was Designed For And Dedicated To Expressive Activity.

One indication that the government purposefully has designed and designated a forum for expressive activity is that the government has a policy of allowing all organizations, or all organizations within a certain group, to use it without each entity having to obtain separate permission. Perry, 460 U.S. at 47. A public forum also may exist if each organization must obtain permission from the government, but such permission is granted as a matter of course.

Id. See also Widmar, 454 U.S. at 267-68. The CFC was designed for and dedicated to expressive activity -- charitable solicitation -- and has been made available as a matter of course to health and welfare charities.

Petitioner has engaged in revisionist history in an effort to demonstrate that the CFC was not designed or designated as a forum for expressive activity. Petitioner first asserts that the history of the Campaign evidences no intent on the part of the government to allow the public unrestricted access to federal property. (Pet. Br. at 25.) The conclusion is correct but irrelevant. As shown above, this case does not involve indiscriminate public access to federal property; it involves access to a limited forum designed and dedicated as a forum for charitable solicitation. There can be no doubt that the forum is designed for and dedicated to

expressive activity -- charitable solicitation -- by health and welfare charities. That is the Campaign's sole purpose.

The petitioner next strives to justify excluding respondents from the expressive activity allowed in the Campaign by characterizing the CFC as a forum which was created for and limited to "traditional health and welfare charities." (Pet. Br. at 19-21.) Petitioner argues that the CFC is a nonpublic forum that is not open to respondents.

In determining the scope of a forum, the Court should look to what the government has done, not to what it now says. In fact, the CFC has not been so limited; the restriction on legal defense fund participation at issue here was adopted in 1983. No earlier Executive Order or regulation limited participation in the

Campaign to "traditional health and welfare charities" or even used that terminology. 14/

President Kennedy's Executive Order creating the CFC extended the opportunity to solicit funds through the Campaign to "such national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate* * * ." Executive Order No. 10,927. The Executive Order did not purport to limit the CFC to "traditional health and welfare charities." To the contrary, it nowhere used the word

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14/ Even assuming the forum is limited to traditional health and welfare charities, petitioner still is not free to draw arbitrary or unreasonable distinctions among charitable organizations "of similar character." Perry, 460 U.S. at 48. As the court of appeals concluded, "appellees [legal defense funds] and the included charities share the traits that have traditionally been considered critical in determining eligibility for the CFC: all provide and support 'direct health and welfare services.'" NAACP Legal Defense and Educational Fund, Inc., 727 F.2d at 1258. See supra note 19 and accompanying text.

"traditional" and contemplated inclusion of "other national voluntary agencies" as well as "voluntary health and welfare agencies."

Two respondents applied to participate in the 1980 Campaign and were excluded. Participation was barred only by the "direct services" criterion for national service agencies, a criterion no longer relevant and not at issue here. 15/

Petitioner expressed his opposition to participation of legal defense funds in the fall 1981 Campaign, but acknowledged that such participation was required under the regulations and the court decision striking down the "direct services" requirement (which

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15/ Two respondents successfully challenged the "direct services" requirement in NAACP Legal Defense and Educational Fund, Inc. v. Campbell, 504 F. Supp. 1365 (D.D.C. 1981). The court, in striking down the requirement, observed that "defendant contended that the plaintiffs, while otherwise qualified, do not provide direct services, but rather serve as advocates for groups." Id. at 1366 (emphasis added).

the government did not appeal). (J.A. 56-59.) See supra note 14. Several legal defense funds, including four of the present respondents, participated in the fall 1981 Campaign. 16/

The Executive Order at issue here was the first statement of Campaign eligibility criteria that ever purported to exclude from the definition of charitable health and welfare agencies those organizations "that seek to influence * * * the determination of public policy through * * * litigation on behalf of parties other

16/ Under Executive Order 12,353, issued in 1982, and the 1982 CFC regulations, 5 C.F.R. § 950.101(a) (1983), legal defense funds continued to participate in the CFC as organizations that provide health and welfare services. The regulations expressly defined "national voluntary health and welfare agencies" to include those involved in "[d]elivery of legal services to the poor and indigent, and defense of human and civil rights secured by law". Id. Accordingly, all respondent legal defense funds participated, without challenge by petitioner Devine, in the Campaign held in fall 1982.

than themselves * * *." Exec. Order No. 12,404 (1983). After two years of active Campaign participation by legal defense funds and prior non-participation by choice or application of an illegal "direct services" requirement, Executive Order No. 12,404 attempted to close the CFC to health and welfare charities that litigate in the public interest.

The "traditional health and welfare charity" talisman is a latter-day contrivance. The Campaign has never been limited to such groups (if, indeed, the government could define what groups that term includes). Petitioner should not be permitted to bootstrap his own unreasonable bar on legal defense fund participation in the CFC into a definition of the forum at issue. See Widmar, 454 U.S. at 268-69; cf. City of Madison Joint School District, 429 U.S. at 174-76.

2. Expressive Activity Within The Forum, The Combined Federal Campaign, Is Compatible With The Normal Activities Of The Forum.

As demonstrated in part A above, the CFC itself is the relevant forum for purposes of First Amendment analysis. The expressive activity in which legal defense funds seek to engage -- the 30-word statement in the Campaign brochure -- is not only compatible with the Campaign, it is expressly permitted in the Campaign regulations as the single means of expression afforded to the participating charities. The second prong of the public forum test -- compatibility -- thus is self-executing. 17/

17/ Even if the expression at issue is viewed in the context of the federal workplace, as petitioner would have it, it still is compatible with the normal activities of the time and place in which it occurs because the brochure is so nonintrusive. See supra note 5.

3. Access To The Forum Has Not Been So Selective That The Forum Is Nonpublic.

Petitioner asserts that the CFC should be seen as a basically non-expressive activity in the federal workplace in which the government has permitted select groups to engage. (Pet. Br. at 23-29.) Petitioner thus attempts to harmonize the circumstances of this case with the "selective access" cases in which the government provided particular groups with selective access to a forum without creating a public forum as a result. (Pet. Br. at 26-27.) Petitioner relies upon Perry; Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Greer v. Spock, 424 U.S. 828 (1976); and Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). The deliberate creation of the CFC as a forum for charitable solicitation open to all health and welfare charities is unlike the "selective access" involved in those cases because expressive

activity associated with the CFC involves broad and systematic access to health and welfare charities rather than selective access, and on-the-job solicitation does not advance the government's proprietary mission. Moreover, respondents are "similar in character" to charities for which the forum was created. Perry, 460 U.S. at 48.

In Perry, this Court upheld a collective bargaining agreement which gave the exclusive bargaining representative access to the interschool mail system and denied such access to a rival organization. The Court concluded that the internal mail system was not a public forum and exclusive use was necessary to permit the bargaining representative to perform its responsibilities effectively and was consistent with preserving the property for its dedicated use. 460 U.S. at 47-48, 50-51. Although the rival union had previously been given access to the mail

facilities, its status changed when another union became the exclusive representative. Id. at 48. It was not the forum but the rival union's status that changed, from a representative of some of the teachers to a rival of the teachers' exclusive representative. Id. Thus, consistent with "the School District's preservation of the facilities for school-related business," the rival union could be excluded. Id. 18/ No

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18/ Of course, the government has the same rights as a private property owner to safeguard property for the uses to which it is dedicated. Adderly v. Florida, 385 U.S. 39, 40 (1966). The government's right to exclude expressive activity is greatest when it is acting in a purely "proprietary" capacity. E.g., Lehman, 418 U.S. 298. When the government permits expression which merely furthers the business or mission of the property, it is exercising its proprietary role, and its interest is not readily superseded by an obligation to protect the exchange of ideas. The expression allowed by the government in the CFC is not in furtherance of the purpose of the federal workplace -- to get the government's work done. The government has

[Footnote continued]

such difference in status sets legal advocacy organizations apart from other health and welfare charities. 19/

Although the record in Perry demonstrated isolated instances of access to the mail facilities by a limited number of outside organizations, there was no specific policy or practice that the mail system be open to the general public or to employee organizations. Id. at 47. These isolated instances of outside access did not turn the

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18/ [Footnote continued]

opened up the workplace for the CFC and thus has created a channel of public access that is open to a freer flow of ideas than the workplace itself.

19/ As the court of appeals stated: "[T]here is no discernible difference in the status of the appellees and that of the organizations which have been permitted access to the CFC * * *. [A]ppellees and the included charities share the traits that have traditionally been considered critical in determining eligibility for the CFC: all provide and support 'direct health and welfare services.'" NAACP Legal Defense and Educational Fund, Inc., 727 F.2d at 1258.

mail facilities into a public forum because they involved groups that advance the purposes of a school. In contrast, the CFC is a highly organized means of access created to permit expressive activity through charitable solicitation by health and welfare charities. Moreover, the outside groups that used the facilities in Perry were "organizations that engage in activities of interest and educational relevance to students" and not concerning the "terms and conditions of teacher employment." Id. at 48. 20/ In alternative reasoning, the Court observed that granting access to such student-related organizations would extend a constitutional right of access "only to other

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20/ Cf. Ysleta Fed'n of Teachers v. Ysleta Independent School Dist., 720 F.2d 1429 (5th Cir. 1983) (once school opened mail system to all employee organizations without distinction it became bound by constitutional standards applicable to traditional public forum).

entities of similar character." Id. at 48. No such distinction separates respondents from participating charities. Respondents, like other health and welfare charities, serve the poor and needy. See infra parts II.A. and B. 21/

The Court in Jones considered the constitutionality of prison regulations prohibiting inmates from engaging in labor union activity. The Court, noting "the operational realities of a prison," found the regulations consistent with "reasonable considerations of penal management." 433 U.S. at 126, 132. The Court found no difficulty with the fact that certain service organizations, such as Alcoholics Anonymous and the Jaycees, had been afforded bulk

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21/ There also were "substantial alternative channels" open for communication by the rival union in Perry. 460 U.S. at 53. There is no means of on-the-job charitable solicitation at the federal workplace other than the CFC. See infra part II.B.2.

mailing and meeting rights while the union had not, because the activities of the service organizations were consistent with the rehabilitative mission of the prison and posed no threat to its ordered security. 433 U.S. at 133-36. As in Perry, the Court in Jones looked to the consistency of the speech with the mission of the institution, a difference in the relationship of the included and excluded speech to that mission, and the relatively minor and casual nature of the prior access, and concluded that the granting of selective access to a small number of service organizations did not operate to create a public forum. Id. at 134.

In Greer, the Court upheld a military base regulation banning partisan political speeches and demonstrations. While much of the facility was open to the public, military police patrolled all areas and the Army had not abandoned any claim of control over political speech on the facility. The

commander therefore could exclude proposed face-to-face solicitation of trainees "to avert what he perceive[d] to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command." 424 U.S. at 840. The government was not obliged to permit expressive activity that would conflict with the primary purpose for which the property was intended. Id. at 837-40; 840-42 (Burger, C. J., concurring); 842-49 (Powell, J., concurring).

In Lehman, a plurality of this Court upheld a city policy that allowed commercial advertising in city-owned transit cars but prohibited political advertising. The plurality held that the denial of all political advertising was a business decision made by the government in its proprietary capacity. The nature of the system as a business venture with a captive audience belied Lehman's contention that the system constituted a public forum. The case thus

turned on the plurality's belief that the government possessed the managerial discretion to permit commercial advertising without obligating itself to display partisan political messages, 418 U.S. at 303-04, and Justice Douglas' sensitivity to the "captive audience" of streetcar riders. Id. at 305-08 (Douglas, J., concurring). 22/

Unlike Perry, Jones, Greer, and Lehman, this case does not involve selective access to a forum evincing the government's intent to reserve the forum for proprietary purposes. 23/ Providing limited access to particular civic or service organizations (as

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22/ The "captive audience" is not a problem in the CFC. See supra note 5.

23/ It cannot be seriously argued that in creating the CFC, the government has acted to further the mission or object of the federal workplace (except in the indirect sense of avoiding the disruption incident to ad hoc charitable solicitation). The government is not operating the CFC as a commercial venturer.

the goverment did in Perry, Jones, and Greer) or providing access only to commercial entities (as it did in Lehman) which further the mission or object of the facility differs fundamentally from providing access, year in and year out, to large numbers of charitable organizations for expressive activity through the CFC. Here, the function of the CFC expressly includes serving as a platform for expressive activities. The CFC thus is a limited public forum for health and welfare charities to solicit contributions through the Campaign. Finally, even if access to the forum is selective, the government may not exclude respondents because they are entities similar in character to those to which access has been granted.

II. The Exclusion Of Legal Defense Funds From The CFC Violates The First Amendment.

As long as a limited public forum remains open for speech, the government "is bound by the same standards as apply in a

traditional public forum." Perry, 460 U.S. at 46. The government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are reasonably tailored to achieve a significant government interest, and leave open ample alternative channels of communication." United States v. Grace, 103 S. Ct. at 1707. "A content-based prohibition must be narrowly drawn to effectuate a compelling state interest." Perry, 460 U.S. at 46 (quoting Widmar, 454 U.S. at 269-70). The exclusion of legal defense funds from the CFC cannot withstand scrutiny under this test.

A. Petitioner's Exclusion Of Legal Defense Funds From The CFC Is A Content-Based Restriction On Speech.

Petitioner's attempted exclusion of legal defense funds from the CFC fits squarely within this Court's traditional understanding of a content-based restriction on speech. Petitioner admits that he seeks

to deny legal defense fund participation because such groups "wish to advance * * * a particular cause." Pet. Br. at 7 n.6. In utilizing this rationale, petitioner embraces the "power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Department of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (citations omitted). Petitioner does not seek to exclude "legal aid societies" which litigate, but not, in his view, to advance particular causes. Pet. Br. at 7 n.6. Petitioner seeks to justify his distinction on the ground that legal defense funds propound causes or "messages" through litigation. 24/ This different treatment of

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24/ Petitioner's distinction between legal defense funds and other charitable organizations, whether on the grounds that only one promotes a particular cause or that only one provides services to the needy, fails to survive analysis. Many of the

[Footnote continued]

otherwise equally expressive activity based on the government's view that disfavored speakers explicitly advocate a cause has the clear design of silencing that advocacy. It is, in the most literal sense, content-based regulation of speech.

24/ [Footnote continued]

organizations favored by petitioner's regulations spend the funds raised to help a discrete group or to eradicate a particular problem, not to benefit the indigent generally. That they "[distinguish] * * * on the basis of a particular cause," Pet. Br. at 7 n.6, is thus a spurious ground on which to single out legal defense funds. Furthermore, it is beyond dispute that groups like the respondent legal defense funds aid the needy. The mandate of many legal defense funds, such as the ACLU Foundation, is to vindicate constitutional rights. See In re Primus, 436 U.S. 412, 428-29 (1978) (the ACLU "has represented individuals in litigation that has defined the scope of constitutional protection in areas such as political dissent, juvenile rights, prisoners' rights, military law, amnesty, and privacy"). Those forced to secure their constitutional rights through litigation are often unable to pay the very high cost of such litigation. Legal defense funds therefore customarily serve the needs of the indigent who otherwise might be unheeded.

Moreover, petitioner's exclusion of legal defense funds is in no way viewpoint-neutral. Legal defense funds typically are created to express the view of a particular segment of citizens:

> Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. * * * And under the conditions of modern government, litigation may be the sole practicable avenue open to a minority to petition for redress of grievances. * * * [T]he litigation [the NAACP] assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society.

NAACP v. Button, 371 U.S. 415, 429-31 (1963).

The role of legal defense funds is to invoke judicial intervention on behalf of such minorities; they amplify the voice of the underrepresented who cannot obtain an equal share through petitioning their elected

representatives. 25/ Petitioner's restriction thus discriminates against the viewpoint of minorities and the underrepresented:

> [A] statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens.

Button, 371 U.S. at 435-36. Petitioner's exclusion of legal defense funds from the CFC, by suppressing the goal of the underrepresented to gain representation, is thus a classic viewpoint-based restriction of speech.

25/ "[J]udicial intervention becomes appropriate when the existing processes of representation seem inadequately fitted to the representation of minority interests, even minority interests that are not voteless." J.H. Ely, Democracy and Distrust 86 (1980).

B. Even If Petitioner's Exclusion of Legal Defense Funds Were Content-Neutral, It Could Not Be Upheld.

Even if the exclusion of legal defense funds from the CFC were not content-based, the exclusion does not satisfy this Court's standard for restricting expressive activity in a limited public forum, i.e., that the exclusion is reasonably tailored to achieve significant government interests and leaves open ample alternative channels of communication. 26/

26/ The court of appeals concluded that petitioner's exclusion of legal defense funds could not even withstand the reasonableness test applied in nonpublic forum cases. NAACP Legal Defense and Educational Fund, Inc., 727 F.2d at 1257-68. The facts surrounding the petitioner's justifications for the exclusion are detailed by the courts below and in the Brief for the Respondents and will not be repeated at length here.

1. The Exclusion Of Legal Defense Funds Is Not Reasonably Tailored To Achieve Significant Government Interests.

Petitioner asserts three purposes putatively served by the exclusion of legal defense funds from the CFC:

> [1] lessening the burden of government and local communities in meeting human health and welfare needs; [2] minimizing disruption of the federal workplace and costs of fundraising; and [3] avoiding the reality and appearance that federal resources are being used to advance partisan causes.

(Pet. Br. at 18.) The exclusion of all legal defense funds from the CFC is neither reasonably tailored nor does it achieve any significant government interest.

First, as shown above, supra at part II.A., in Respondents' Brief, and in the decision of the court below, 727 F.2d at 1259-60, legal defense funds clearly serve the needy and provide health and welfare services through their litigation efforts.

As said in the context of an argument similar to that advanced here:

> The law favors charitable organizations because they perform public services that relieve the public sector pro tanto from a burden that otherwise would be imposed upon it * * *. The common element in all charitable organizations is that they are designed to accomplish objectives which are beneficial to the community and area * * *.
>
> In weighing the benefit rendered, the court does not decide whether the organization is taking the wisest course in trying to help the community; nor is the popularity of the organization's cause determinative.

National Right to Work Legal Defense and Education Foundation, Inc. v. United States, 487 F. Supp. 801, 807 (E.D.N.C. 1979).

Second, petitioner argues that the exclusion of legal defense funds serves to minimize disruption by eliminating "controversial" organizations from the CFC. Not only is this purpose not a significant governmental interest, "it is an

impermissible basis for a restriction upon speech." NAACP Legal Defense & Educational Fund, Inc., 567 F. Supp. at 408 (emphasis in original). As has been noted in another context, the use of the controversial nature of speech as the touchstone for regulation "threatens a value at the very core of the First Amendment, the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 548 n.9 (1980) (Stevens, J., concurring) (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

Finally, petitioner argues that his exclusion of legal defense funds is necessary to avoid conveying the impression that the government is endorsing partisan political activity. This Court has expressly rejected this contention as a justification for suppressing speech. See Widmar, 454 U.S. at

274 & n.14. ("[a]n open forum in a public university does not confer any imprimatur of state approval on religious sects or practices"). Moreover, this Court has pointed out that the availability of disclaimers of government support undercuts the validity of a speech restraint. See FCC v. League of Women Voters, 104 S. Ct. 3106, 3125 (1984); Widmar, 454 U.S. at 274 n.14; U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 771-72 (D.C. Cir. 1983). The government has the same alternative in this case.

2. The Exclusion Of Legal Defense Funds Does Not Leave Open Ample Alternative Channels Of Communication.

"A restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." Members of the City Council of Los Angeles v. Taxpayers for Vincent, 104 S.Ct. 2118, 2133 (1984). Accord, United States v. Grace, 103

S. Ct. at 1711; Southeastern Promotions, Ltd. v. Conrad, 420 U.S. at 5560. See also Schneider v. State, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

The CFC is "the exclusive forum for charitable solicitation in the Federal workplace, and * * * a critical medium for making charitable appeals to Federal employees." NAACP Legal Defense & Educational Fund, Inc., 727 F.2d at 1265 (emphasis in original). Moreover, contrary to petitioner's assertion (Pet. Br. at 14), the court of appeals did not conclude that the availability of alternative fora "was essentially irrelevant to analysis of the reasonableness of the Campaign limitations * * *." (Id.) Rather, the court held that "[e]ffective charitable solicitation depends on economical and efficient means to

communicate one's message to mass audiences." 727 F.2d at 1265. There is but one economical and efficient means for legal defense funds to reach the audience of federal employees: participation in the CFC, the exclusive forum for solicitation of that audience at the workplace. Cf. Black United Fund of New Jersey, Inc. v. Kean, 593 F. Supp. 1567, 1569 (D.N.J. 1984).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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